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Supreme Court, U.S.
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No. 02-1600

In The
Supreme Court of the United States

NARENDRA M. PATEL, M.D.,

Petitioner,

v.

TOMMY G. THOMPSON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

NARENDRA M. PATEL, Plaintiff, v. TOMMY G. THOMPSON, Secretary, United States Department of Health and Human Services, and JANET REHNQUIST, Inspector General, Department of Health and Human Services, Defendants.	:	CIVIL ACTION NO. 4:00-CV-277-HLM

FINAL REPORT AND RECOMMENDATION
AND ORDER

Plaintiff, Narendra M. Patel, M.D., appeals a final decision of the Secretary of the Department of Health and Human Services excluding him from participation in Medicare, Medicaid, and all other federally funded healthcare programs as a healthcare provider for a minimum period of ten years. Dr. Patel has exhausted his administrative remedies, and this case is ripe for judicial review. For reasons stated below, the undersigned **RECOMMENDS** that the administrative decision be **AFFIRMED**.

This action is also before the court on two motions filed by plaintiff seeking permission to supplement the administrative record [Docs. 16 & 17]. These motions are addressed in Part IV of this Report and Recommendation.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a licensed physician specializing in gastroenterology. On June 16, 1997, plaintiff pled *nolo contendere* to one misdemeanor count of sexual battery in the Superior Court of Whitfield County, Georgia. (Admin. Rec., App. A at 312). The count charged that, on or about August 20, 1996, plaintiff "did intentionally make physical contact with the intimate parts of the body, to wit: breasts, of another female person, to wit: [K.T.[1]], without the consent of [K.T.], by placing his mouth upon her breast. . . . " (*Id.* at 313).

On August 21, 1996, the day after the alleged sexual battery, K.T. submitted a sworn and notarized statement to the Board of Medical Examiners for the State of Georgia regarding the incident. Therein, K.T. stated that, during a medical appointment she had with Dr. Patel on August 20, he put his mouth on her breast and inappropriately touched her genitals. (Admin. Rec., App. A at 331). She wrote:

> I suffer from Crohns Disease. I had an appointment for a check up with my doctor, Narendra Patel, on August 20, 1996 at 11:00 a.m. While examining me, he asked me if I had any chest pain. I did not understand why he asked that question because my disease effects my gastrointestinal system. However, I said no, but I told him I did have a lump in my left breast. . . . He started to examine the lump. Then, he put his mouth over my nipple. I did not know what to

[1] The victim's initials rather than her full name will be used to protect her privacy.

> say or do. . . . Before the breast exam, he had been pushing on my stomach to see if I felt any pain in my colon. [W]hile doing this, he performed a pelvic exam with no one in the room. He did not have gloves on when he did this exam and he did put his finder [sic] in my vagina.

(*Id.*).

At plaintiff's plea and sentencing hearing before the Whitfield County Superior Court, he responded affirmatively to the following question posed by the court:

> Court: All right. You are charged, Dr. Patel, with sexual battery, and that is with making – intentionally making physical contact with the intimate parts of the body of another person, [K.T.], without her consent, by placing your mouth upon her breast. As I understand it, she was a patient of yours. Did you do that?
>
> Patel: Yes.
>
> Court: Is that the truth?
>
> Patel: Yes.

(Admin. Rec. at 335).

Pursuant to the plea agreement, the court sentenced plaintiff to 11 months and 29 days of probation, a fine of $5,000, community service of 150 hours, and a probation fee of $20 per month. The court also ordered plaintiff to obtain an evaluation and treatment from professionals in the field of behavioral disorders. Plaintiff was sentenced as a "first offender" under Georgia law. (Admin. Rec., App. A at 337).

On July 11, 1997, the Composite State Board of Medical Examiners for the State of Georgia summarily suspended plaintiff's Georgia medical license citing his conviction as well as eight other complaints received from female patients. (Admin. Rec., App. A at 340-41). The Order of Summary Suspension states that plaintiff "placed his mouth on the breast of a female patient without the patient's consent." (*Id.*). On October 1, 1997, plaintiff entered into a consent order issued by the Board of Medical Examiners requiring suspension of his medical license for two years, with all but six months of the suspension to be stayed provided certain conditions were met. (*Id.* at 319-28).

On November 7, 1997, Plaintiff entered into a stipulation with the Medical Board of California for the surrender of his California medical license, which had previously been temporarily suspended. (Admin. Rec., App. A at 344-47). The stipulation went into effect on December 24, 1997. (*Id.* at 343).

On December 2, 1997, plaintiff's therapist certified to the Georgia Board of Medical Examiners that he was fit to return to practice and that he did not pose a threat to his patients. (Admin. Rec., App. B at 353). Thereafter, the suspension of plaintiff's Georgia medical license was lifted.

On June 12, 1998, the Inspector General for the Department of Health and Human Services notified Dr. Patel that he would be excluded from participation in Medicare, Medicaid, and other federally funded healthcare programs for a minimum of five years, and that the period of exclusion could be increased based on aggravating factors. (Doc. 16, Exh. A). After plaintiff responded, the Inspector General sent a letter, dated October 30, 1998,

notifying plaintiff of the Inspector's decision to exclude plaintiff for a minimum of ten years, effective November 19, 1998. (Admin. Rec., App. A at 309-10).

Plaintiff then requested administrative review of the Inspector General's determination by an Administrative Law Judge ("ALJ"). (Admin. Rec., App. A at 316). By decision dated November 22, 1999, the ALJ affirmed the Inspector General's findings and found the ten-year exclusion to be reasonable. (Admin. Rec., Pt. 1 at 3). On July 14, 2000, the Departmental Appeals Board ("DAB") reviewed and affirmed the ALJ's decision, making the DAB decision the final decision of the Secretary. 42 C.F.R. § 1005.21(j).

II. ADMINISTRATIVE FINDINGS

By letter dated October 30, 1998, the Office of the Inspector General ("OIG") for the Department of Health and Human Services ("HHS") notified plaintiff of his ten-year exclusion. (Admin. Rec., App. A at 309-10). The letter stated that plaintiff would be excluded from participation in federally funded healthcare programs for a mandatory minimum of five years due to his conviction "of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service." (*Id.* at 309). The letter also explained that plaintiff's minimum period of exclusion had been increased from five to ten years due to evidence that plaintiff had engaged in a non-consensual sexual act and a "continuing pattern of behavior," as well as evidence that plaintiff's license had been revoked by the California Medical Board. (*Id.*).

Thereafter, the ALJ conducted a *de novo* review of the Inspector General's findings of fact and conclusions of law. *See* 42 U.S.C. § 405(b); 42 C.F.R. §§ 1005.15, 1005.20 (2001); Admin. Rec., Pt. 1 at 9. With respect to the Inspector General's discretionary determination to impose an additional five-year exclusion, the ALJ applied a reasonableness standard of review. (*See* Admin. Rec., Pt. 1 at 9).

Applying these standards, the ALJ affirmed the mandatory minimum exclusion of five years and found the additional five years imposed by the Inspector General to be reasonable. In contrast to the Inspector General, the ALJ found evidence regarding a pattern of sexual abuse to be incredible, but nonetheless found an additional five years to be reasonable. (*Id.* at 13-14). The ALJ provided the following rational [sic] for his finding regarding reasonableness:

> The most persuasive evidence in this case is Petitioner's admission that he sexually abused a patient. . . . 42 C.F.R. § 1001.102(b)(4). When an individual submits to an examination by a health care provider that individual is highly vulnerable to abusive conduct. In the normal course of the examination, the individual must submit to the most intimate conceivable scrutiny. The patient must rely on the provider's judgment and good faith. The doctor-patient relationship embodies a bond of trust that transcends all but the closest of personal relationships.
>
> I am aware that a ten-year exclusion is a very lengthy exclusion. However, I find it not to be unreasonable in light of the egregiousness of Petitioner's conduct and given even a slight possibility that such conduct might recur at some time in the future. A ten-year exclusion is reasonable

> given the way in which Petitioner breached his relationship of trust with K.T. Petitioner's actions might damage irretrievably the doctor-patient relationship between Petitioner and any of his patients. Petitioner's conduct towards K.T. suggests that others might be vulnerable if similarly situated. Given Petitioner's conduct, his continued participation in federally funded health care programs would be a legitimate reason for beneficiaries and recipients to suspect the integrity of both Petitioner and the programs themselves.

(Admin. Rec., Pt. 1 at 18-19).

The DAB then reviewed the ALJ's decision and concluded that the ALJ's findings were supported by substantial evidence. (Admin. Rec., Pt. 1 at 41, 49); *see also* 42 C.F.R. § 1005.21(h) (2001) (requiring the DAB to affirm the ALJ's findings of fact if supported by substantial evidence and to perform a plenary review of the law).

III. STANDARD OF REVIEW

Individuals, such as Dr. Patel, who are excluded from participation in Medicare and Medicaid, are "entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. . . . " 42 U.S.C. § 1320a-7(f). Under § 405(g), this court must affirm the Secretary's findings of fact if they are supported by "substantial evidence." 42 U.S.C. § 405(g). "Substantial evidence" means such "relevant evidence as a reasonable person would accept as adequate to support a conclusion." *MacGregor v. Bowen*,

786 F.2d 1050, 1053 (11th Cir. 1986); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). It may be present even if a preponderance of the evidence weighs in favor of the petitioner. *Barnes v. Sullivan*, 932 F.2d 1356, 1358 (11th Cir. 1991). The reviewing court may not decide the facts anew, reweigh the evidence, or substitute its judgment for that of the Secretary. *Barnes*, 932 F.2d at 1358.

In contrast to the Secretary's findings of fact, no presumption of validity attaches to his application of the law. *Lamb v. Bowen*, 847 F.2d 698, 701 (11th Cir. 1988). "A determination that is supported by substantial evidence may be meaningless . . . if it is coupled with or derived from faulty legal principles." *Boyd v. Heckler*, 704 F.2d 1207, 1209 (11th Cir. 1983). Thus, the Secretary must "apply the correct law" and, importantly, must also "provide the reviewing court with sufficient reasoning for deeming that the proper legal analysis has been conducted. . . . " *Keeton v. Department of Health and Human Services*, 21 F.3d 1064, 1066 (11th Cir. 1994) (citing *Cornelius v. Sullivan*, 936 F.2d 1143, 1146 (11th Cir. 1991)).

IV. MOTIONS TO SUPPLEMENT THE RECORD

Plaintiff seeks permission to supplement the administrative record with a letter he received from the Secretary's Assistant Regional Inspector General for Investigations dated June 12, 1998. (Doc. 16, Exh. A). He also seeks to add a letter sent by his attorney, on August 21, 1998, to the Regional Inspector General for Investigations, which includes arguments and supporting evidence as to why

plaintiff should not be excluded from participation in federally funded healthcare programs. (Doc. 17, Exh. A).

Defendant opposes both motions. He argues that only information in the certified administrative record may be considered by this court. (Doc. 19). In reply, plaintiff contends that the letters are part of the administrative record, and that the Secretary erred in not including them in the record sent to the court. (Doc. 21).

The Secretary is required to file with this court "a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based." 42 U.S.C. § 405(g); *see also* 42 U.S.C. § 1320a-7(f) (requiring application of § 405(g)). The Secretary's regulations state that "[t]he transcript of testimony, exhibits and other evidence admitted at the hearing [before the ALJ], and all other papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary." 42 C.F.R. § 1005.18(b) (emphasis added). Plaintiff contends that the highlighted portion of this regulation refers to documents such as those at issue here. (Doc. 21 at 7).

The court does not agree with plaintiff's interpretation of the regulation. The highlighted language more likely refers to incidental documents associated with the administrative hearing, such as letters between the parties and the court regarding the hearing, as well as briefs submitted to the ALJ by the parties. Nonetheless, the court finds that the June 12, 1998 letter from the Regional Inspector General for Investigations should be treated as part of the administrative record. (Doc. 16, Exh. A). The Secretary does not dispute the authenticity of this letter, which he was required to provide to plaintiff. *See* 42 C.F.R.

§ 1001.2001(a). Accordingly, plaintiff's Motion to Supplement the Record with the June 12, 1998 Letter [Doc. 16] is **GRANTED**.

A different outcome is warranted with respect to plaintiff's second motion. The August 28, 1998 letter was written by plaintiff's counsel and addressed to the Regional Inspector General for Investigations. (Doc. 17, Exh. A). It consists of counsel's arguments as to why an exclusion should not be imposed, as well as numerous supporting documents. The vast majority of the documents are already a part of the administrative record, having been separately submitted to the ALJ by plaintiff's counsel. (*See* Admin. Rec., App. B at 351-502). Furthermore, counsel's arguments are merely repetitive of those made by plaintiff in numerous briefs and letters found throughout the certified record. Thus, unlike the June 12, 1998 letter from the Regional Inspector General, which provides the court with undisputed and arguably relevant evidence regarding when proceedings against plaintiff were commenced by the Inspector General, the August 21 letter provides the court with no useful information not otherwise contained in the record. Accordingly, plaintiff's Motion to Supplement the Record with the August 21, 1998 Letter [Doc. 17] is **DENIED**.

V. MERITS OF PLAINTIFF'S APPEAL

A. Substantial Evidence Supports the Secretary's Determination that Dr. Patel's Conviction Related to Abuse of a Patient in Connection with the Delivery of a Healthcare Service

The Social Security Act instructs the Secretary of Health and Human Services to exclude from participation

in federally funded healthcare programs "[a]ny individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." 42 U.S.C. § 1320a-7(a)(2). The minimum period of exclusion required by the statute is five years. 42 U.S.C. 1320a-7(c)(3)(B).

Plaintiff argues that the mandatory five-year exclusion is not applicable to him because the record contains insufficient evidence that the criminal offense to which he pled *nolo contendere* occurred "in connection with the delivery of a health care item or service." In particular, plaintiff contends, in reference to K.T.'s notarized statement submitted to the Georgia Board of Medical Examiners, that the Secretary's "reliance upon unauthenticated, uncorroborated hearsay not part of the criminal record to 'prove' the setting of the offense [which was not specified in the indictment] is arbitrary, capricious, and an abuse of discretion." (Doc. 18 at 7-8; *see also id.* at 10-12). This argument is without merit.

The Secretary is not bound by the Federal Rules of Evidence. 42 U.S.C. § 405(b), 42 C.F.R. § 1005.17(b). "'Hearsay is admissible in administrative hearings and may constitute substantial evidence if found reliable and credible.'" *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000) (quoting *Williams v. U.S. Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986)); *see also Richardson v. Perales*, 402 U.S. 389, 402-06, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).

K.T.'s statement, when considered in the context of the record as a whole, is plainly reliable and credible. Plaintiff does not deny that he sexually abused K.T. in the

manner alleged in the criminal indictment. K.T.'s statement, prepared and signed under penalty of perjury just one day after the abuse, is completely consistent with this admission and with all other information in the criminal record. There simply is no reason to suspect that K.T. lied about the circumstances surrounding the abuse. Furthermore, during plaintiff's plea hearing, the judge noted that K.T. "was a patient of yours," which plaintiff did not deny. (Admin. Rec., App. A at 335). The Secretary's finding that K.T.'s statement provided credible and reliable evidence is thus well supported by the record.

B. The October 1998 Regulation Applies to Plaintiff

Plaintiff next argues that, even if the mandatory five-year exclusion is applicable to him, the Secretary erred in extending his exclusion to ten years by applying a regulation that did not become effective until October 1998, after his 1997 conviction and the Inspector General's initial correspondence with plaintiff regarding exclusion. Application of the amended regulation in his case, according to plaintiff, had an impermissibly retroactive effect.

1. Relevant Regulatory Provisions

In 1992, the Secretary promulgated regulations implementing 42 U.S.C. § 1320a-7. With respect to the length of the exclusion, those regulations stated, in relevant part:

> Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion [beyond five years] – . . .
>
> (3) The acts that resulted in the conviction, or similar acts, had a significant adverse

> physical, mental or financial impact on one or more program beneficiaries or other individuals; [or]
>
> (6) the convicted individual or entity has a prior criminal, civil or administrative sanction record; . . . .

42 C.F.R. §§ 1001.102(b) (1992).

In 1997, the Secretary published several proposed changes to this regulation in the *Federal Register*. 62 Fed. Reg. 47182, *et seq.* (Sept. 8, 1997). With slight modifications, these changes were later adopted by the Secretary and went into effect on October 2, 1998. 62 Fed. Reg. 46676, *et seq.* (Sept. 2, 1998). The modified regulation states, in relevant part:

> Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion – . . .
>
> (3) The acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals;
>
> (4) In convictions involving patient abuse or neglect, the action that resulted in the conviction was premeditated, was part of a continuing pattern of behavior, or **consisted of non-consensual sexual acts;** . . .
>
> (9) Whether the individual or entity was convicted of other offenses besides those which formed the basis for the exclusion, or has been the subject of **any other adverse action by an Federal, State or local government agency or board, if the adverse action is based on**

the same set of circumstances that serves as the basis for imposition of the exclusion.

42 C.F.R. § 1001.102(b) (2001) (emphasis added).[2]

When announcing the fourth factor, the Secretary described it as one of "[a] limited number of *policy* decisions . . . that relate to the clarification of . . . the OIG's [Office of Inspector General's] exclusion authority under [42 U.S.C. § 1320a-7(a)(2)] concerning patient neglect and abuse convictions. . . . " 62 Fed. Reg. 47184-85 (Sept. 8, 1997) (emphasis added). The stated purpose of the new factor was "to help distinguish between more egregious and less egregious cases involving patient abuse." *Id.* at 47185.

With respect to the ninth factor (then the eighth factor), the Secretary stated that it applies to adverse actions taken against the healthcare provider by other federal, state, or local entities "based on the same set of circumstances that is serving as the basis for imposition of the exclusion." 42 Fed. Reg. 47185 (September 8, 1997). According to the Secretary, "[t]his additional factor is consistent with [past] ALJ decisions regarding aggravating factors and the length of exclusion." *Id.* The Secretary described both of these factors as "technical and conforming changes designed to clarify OIG exclusion authority policy." 63 Fed. Reg [sic] 46677.

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[2] As originally published, the final quoted factor was labeled § 1001.102(b)(8). Due to subsequent changes not relevant here, that factor has since been designated as § 1001.102(b)(9). Many of the documents in the record refer to the factor as § 1001.102(b)(8).

2. Retroactivity Disfavored in the Law

"Retroactivity is not favored in the law." *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). For this reason, "administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen,* 488 U.S. at 208. Similarly, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* In the case of the Department of Health and Human Services, no such power has been granted by Congress. *Id.*, 488 U.S. at 213; *see also* 42 U.S.C. §§ 405(a), 1395xhh. Thus, if the regulation at issue in this case has a retroactive effect, it cannot be applied to plaintiff. As the discussion below will demonstrate, however, application of the 1998 rule to plaintiff did not produce a retroactive effect.

3. No Retroactive Effect

"While statutory retroactivity has long been disfavored, deciding when a statute [or regulation] operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Products,* 511 U.S. 244, 268, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). "Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." *Landgraf,* 511 U.S. at 270.

In General, "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches

a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Landgraf*, 511 U.S. at 269 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (No. 13,156) (CCHN 1814)). A statute does not operate retrospectively, however, "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted). This requires "a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. "[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.*

In *Landgraf*, on which plaintiff relies, the Supreme Court considered whether two provisions of the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, should be applied in a case pending before a lower court at the time the amendments became law. The amendments in question created a right to recover compensatory and punitive damages for employment discrimination (in addition to lost wages, which were previously allowed) and also authorized any party to demand a jury trial. *See Landgraf*, 511 U.S. at 247. Ultimately, the Court held that application of the amendments

to the pending case would create an impermissible retroactive effect.[3]

In reaching this conclusion with respect to the provision regarding compensatory damages, the Court first observed that the provision was not susceptible to easy classification. *Landgraf*, 511 U.S. at 281. Concerns about lack of fair notice were "muted," according to the Court, because the new law did "not make unlawful conduct that was lawful when it occurred" and because "discrimination was in many cases (although not this one) already subject to monetary liability in the form of backpay." *Id.* at 282. The Court also noted the lack of a "'retributive' or other suspect legislative purpose" for the amendment, reflecting "Congress' desire to afford victims of discrimination more complete redress for violations of rules established more than a generation ago in the Civil Rights Act of 1964." *Id.* Thus, the compensatory damages provision was "not in a category in which objections to retroactive application on grounds of fairness have their greatest force." *Id.*

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[3] The Secretary relies heavily on a general legal maxim stating that courts must apply the law in effect at the time their decisions are rendered. Although not mentioned by the Secretary, *Landgraf* includes a discussion of this maxim. The Supreme Court found it necessary to reconcile the maxim with the "seemingly contradictory" axiom that "'[r]etroactivity is not favored in the law,' and its interpretive corollary that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Landgraf*, 511 U.S. at 264. The Court concluded that the maxim relied on by the Secretary is applicable only when the intervening statute "authorizes or affects the propriety of *prospective* relief." *Id.* at 273 (emphasis added). Under these circumstances, "application of the new provision is not retroactive." *Landgraf*, 511 U.S. at 273. Thus, by relying on the maxim, the Secretary begs the central question before the court: whether the modified regulation has a retroactive effect.

Nonetheless, the Court concluded that the compensatory damages provision would operate retrospectively if applied in that case because, "[u]nlike certain other forms of relief, compensatory damages are quintessentially backward looking." *Id.* at 282. Compensatory damages "may be *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants." *Id.* Furthermore, according to the Court, "[t]he introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning." *Id.*

Like the change to Title VII, the regulatory amendments at issue in this case do not sanction conduct that was lawful when it occurred; the amendments apply only to conduct already sanctioned by the 1992 regulation, thus diminishing any concerns about lack of notice. Furthermore, like the compensatory-damages amendment to Title VII, the Secretary's amended regulation does not have a retributive purpose. The "basic purpose" of the statute on which the regulation is premised is "to improve the ability of the Secretary and the Inspector General of [HHS] to protect Medicare, Medicaid, [and other social services programs] from fraud and abuse, and to protect the beneficiaries of those programs from incompetent practitioners and from in appropriate or inadequate care." *Manocchio v. Kusserow*, 961 F.2d 1539, 1541 (11th Cir. 1992) (quoting S.Rep. No. 109, 100th Cong., 1st Sess. 1-2 (1987)). Thus, imposition of an exclusionary period is a remedial sanction designed to protect the public. Though its consequences may be harsh, it is not a punishment. *Manocchio*, 961 F.2d at 1541-42; *see also Flemming v. Nestor*, 363 U.S. 603, 614, 80 S.Ct. 1367, 4 L.Ed.2d 1435

(1960) (finding that a law serving non-punitive goals "is not punishment, even though it may bear harshly on one affected"). Accordingly, the amendments at issue in this case are "not in a category in which objections to retroactive application on grounds of fairness have their greatest force." *Landgraf*, 511 U.S. at 282.

The comparison to the Title VII amendment regarding compensatory damages however, ends here. Unlike that amendment, the change to the Secretary's regulation is not "quintessentially backward looking," nor does it affect the monetary liabilities of the affected healthcare providers. Instead, the regulation, when applied, prohibits *future* participation in federally funded healthcare programs. Thus, it is more like the change in the law addressed by the Supreme Court in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed.2d 189 (1921). That case "held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing." *Landgraf*, 511 U.S. at 273. "When the intervening statute authorizes or affects the propriety of prospective relief [in this case, relief for patients from care by untrustworthy doctors], application of the new provision is not retroactive." *Id.*

This finding is further supported by the Supreme Court's reasoning in *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), and *Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000). In *St. Cyr*, the Court considered whether an amendment to the Immigration and Nationality Act, which limited the availability of discretionary relief from deportation, should apply to conduct that occurred before the amendment went into effect. *See St.*

Cyr, 533 U.S. at 292-93. St. Cyr had pled guilty to a charge of selling a controlled substance and, as a result, was subject to deportation under the law as it existed both before and after commission of his crime. At the time of his guilty plea, he was eligible for a waiver of deportation at the discretion of the Attorney General. By the time his case was considered by the Immigration and Naturalization service, however, the possibility of a waiver had been eliminated by the relevant amendment. *See id.* at 293.

The Court concluded that the amendment had an impermissible retroactive effect, and therefore could not be applied in St. Cyr's case. By eliminating any possibility of relief for people who entered into plea agreements with the expectation that they would be eligible for such relief, the amendment clearly attached a new disability with respect to a past transaction. *St. Cyr,* 533 U.S. at 321. According to the Court, "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 322. Prior to the amendment, the number of aliens granted a discretionary waiver of deportation had been "extremely large," having been granted to over 10,000 aliens in the period between 1989 and 1995. *Id.* at 295-96. "[P]reserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323 (footnote omitted).

In *Garner v. Jones, supra,* the Supreme Court considered whether a change in the regulatory provision governing the minimum interval of time between parole hearings for convicted criminals would violate the *Ex Post Facto* Clause of the United States Constitution if applied to a

convict incarcerated before the change went into effect. Although *Garner* concerns the *Ex Post Facto* Clause, which is applicable only to punitive enactments, it has relevance here: Before a law can be considered *ex post facto*; it must be "retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (footnotes omitted).[4] The "controlling inquiry" for the Court was "whether [the] retroactive application of the change . . . created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Garner*, 529 U.S. at 250. A speculative or attenuated possibility of increase would not be sufficient. *See id.* at 251 (discussing *California Dept. of Corrections v. Morales,* 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)).

To answer this question, that Court, as it did in *St. Cyr*, looked to evidence regarding the actual – as opposed to the speculative – impact of the change on the prisoner's prospects for parole created by the new regulation. Unlike in *St. Cyr*, the Court concluded that the requisite risk was "not inherent in the framework of amended Rule," which allowed for the discretionary possibility of more frequent parole hearings, and that an increased risk had "not otherwise been demonstrated on the record." *Garner,* 529 U.S. at 251. Accordingly, the court remanded the case for additional proceedings to determine whether, as applied to

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[4] *Garner* is also directly relevant to plaintiff's footnote assertion that the Secretary's application of § 1001.102(b) to him is punitive, thus raising *ex post facto* concerns. (Doc. 18 at 24 n.1).

the prisoner's own sentence, "the law created a significant risk of increasing his punishment." *Id.* at 255.

Importantly, both *St. Cyr* and *Garner* concern alterations to rules governing *discretionary* decisionmaking. In both cases, the Court emphasized that the discretionary nature of the enactments was not controlling. *See St. Cyr*, 533 U.S. at 325 ("There is a clear difference, for purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."); *Garner*, 529 U.S. at 253 ("presence of discretion does not displace the protections of the *Ex Post Facto* Clause"). Nevertheless, the Court observed that "discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience." *Garner*, 529 U.S. at 253. Thus, changes in the way discretion is exercised are less likely to offend the notice concerns associated with retroactive application of the law. *See id.*

The regulatory changes at issue in this case, unlike the changes discussed in *St. Cyr* and *Garner*, clearly do not implicate any of the concerns associated with retroactive legislation. As the Secretary argues, discretion to impose a period of exclusion greater than five years existed both before and after the 1998 amendments. The 1992 regulation allowed a period greater than five years whenever "[t]he acts that resulted in the conviction . . . had a significant adverse physical, mental or financial impact on one or more . . . individuals." 42 C.F.R. § 1001.102(b)(3) (1992). The evidence and the nature of the

criminal act support a finding that plaintiff's conduct had a significant adverse mental impact on K.T.[5] Furthermore, the 1998 regulation was intended merely to clarify the original 1992 regulation and "to help distinguish between more egregious and less egregious cases involving patient abuse." 62 Fed. Reg. 47185 (Sept. 8, 1997). A significant change in the way discretionary decisions are made was apparently not intended. The new factors merely "permit a more careful and accurate exercise of the discretion the [Secretary] has had from the outset." *Garner,* 529 U.S. at 254. In any event, plaintiff has produced no evidence indicating that the new rule had any significant impact on how the decision in his, or any other case, was made. "When the rule does not by its own terms show a significant risk, the [plaintiff] must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of [exclusion] than under the earlier rule." *Garner*, 529 U.S. at 255.

For all of these reasons, the court finds that the 1998 amendments to 42 C.F.R. § 1001.102(b) do not have an impermissibly retroactive effect when applied to plaintiff.

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[5] K.T. states that she was "very upset and embarrassed" and that she was "frightened and ashamed" when she left Dr. Patel's office. (Admin. Rec., App. A at 331).

C. The Secretary's Imposition of a Ten-Year Period of Exclusion was Not Arbitrary, Capricious, or an Abuse of Discretion

Plaintiff next argues that, even if the 1998 regulation is applicable, the Secretary's decision to lengthen his exclusion by and additional five years cannot stand because it is arbitrary, capricious, and an abuse of discretion. (Doc. 18 at 21-24). In particular, plaintiff contends that the Secretary erroneously applied one factor and failed to articulate a rational reason for applying another.

1. Standard of Review

Before addressing the substance of these arguments, a short discussion of the appropriate standard of review is required. Plaintiff relies on a portion of the Administrative Procedure Act requiring courts to set aside administrative decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review of an action under the Administrative Procedure Act, however, is appropriate only if Congress has not otherwise provided adequate review procedures for the agency action in question. *Bowen v. Massachusetts,* 487 U.S. 879, 903, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) ("When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies."); *see also* 5 U.S.C. § 704; *Califano v. Sanders,* 430 U.S. 99, 104-07, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) (finding that the Administrative Procedure Act does not provide an independent source of jurisdiction for judicial review of a decision of the Secretary regarding Social

Security benefits). Moreover, § 405(h) of Title 42, which is also applicable here, *see* 42 U.S.C. § 1320a-7(f)(3), states that "[n]o findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided." *See Califano*, 430 U.S. at 110-11 (Stewart J., concurring) (finding that § 405(h) precludes a social security action under the Administrative Procedure Act); *accord Biron v. Harris*, 668 F.2d 259, 260-61 (6th Cir. 1982); *Baxter v. Schweiker*, 538 F.Supp. 343, 346 (N.D.Ga. 1982). Accordingly, plaintiff's argument must be addressed using the standard of review afforded by 42 U.S.C. § 405(g).

That standard requires this court to ensure that the Secretary engaged in "reasoned decision making," *Owens v. Heckler*, 748 F.2d 1511, 1514 (11th Cir. 1984), but does not allow this court to reweigh the evidence or substitute its judgment for the Secretary's, *Barnes* 932 F.2d at 1358.[6]

2. Factor Regarding Multiple Adverse Actions Applies to Plaintiff

Plaintiff first argues that one of the factors relied on by the Secretary to increase his exclusion is not applicable. That factor states:

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[6] Even if the standard of review specified in 5 U.S.C. § 706(2)(A) were applied to this case, the results would be the same as discussed below. *See North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538-40 (11th Cir. 1990) (discussing arbitrary-and-capricious standard of review); *see also Ginsburg v. Richardson*, 436 F.2d 1146, 1148 n.1 (3rd Cir.) (finding the two standards of review to be equivalent), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971).

> Whether the individual or entity was convicted of other offenses besides that which formed the basis for the exclusion, or has been the subject of any other adverse action by any Federal, State or local Government agency or board, **if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion.**

42 C.F.R. § 1001.102(b)(9) (2001) (emphasis added). Plaintiff argues that a second adverse action taken against him based on the same facts cannot support application of this factor. (Doc. 18 at 22).

As demonstrated by the highlighted phrase, plaintiff's argument is contrary to the regulation's plain language. That language not only permits, but requires the adverse action to be based on the same set of circumstances used to support imposition of an exclusion. The passage from the *Federal Register* on which plaintiff relies, although not a model of clarity, is also unsupportive of plaintiff's position when considered in context. There, the Secretary discussed comments HHS had received regarding its proposed regulation and concluded as follows:

> [W]e are revising the language throughout part 1001 so that **the factor will be relevant to the same conduct and circumstances that serves as the basis for the imposition of the OIG exclusion.** We believe that the revised language is fairer, while allowing the OIG to attain the intended goal of **allowing an increased sanction only if the adverse action was related in some way to the original basis for**

> **the exclusion.**[7] The intent of the revised language is to allow the OIG to increase the length of exclusion if an individual or entity was convicted of other offenses at the same time as he or she was convicted of the offense that served as the basis for the exclusion. Inclusion of this aggravating factor will permit the OIG to increase a length of exclusion when an individual is convicted of Medicare fraud and any other offense, such as drug distribution or income tax evasion. The aggravating factor will take into consideration separate and different types of convictions that occurred concurrently; we do not intend to use the basis of the OIG exclusion more than once as a factor in lengthening an exclusion.

63 Fed. Reg. 46680-81 (Sept. 2, 1998) (emphasis added). As this passage and the plain language of the regulation indicate, consideration of multiple adverse actions taken against plaintiff based on the same underlying misconduct is appropriate.

3. Application of Factor Regarding Non-Consensual Sexual Acts was Reasonable

Plaintiff next argues that a single isolated case of misdemeanor sexual battery is not sufficient to support an increased exclusion under 42 C.F.R. § 1001.102(b)(3). (Doc. 18 at 23). He notes that, when faced with the same evidence, the Georgia Board of Medical Examiners suspended his license for only six months, subject to five years of

[7] The portion of this passage quoted in plaintiff's brief begins with the following sentence.

probation. (*Id.*). According to plaintiff, the Board of Medical Examiners used its "prior experience in such matters, a state psychiatrist's assessment of Dr. Patel, applied a plan of remedial treatment, and judged that Dr. Patel could return to practicing medicine after six (6) months subject to probation." (*Id.*).

As noted above, this court may not substitute its judgment – or the judgment of the Georgia Board of Medical Examiners – for that of the Secretary. Given the presence of two aggravating factors, as well as the nature of plaintiff's misconduct, the court cannot find that the addition of five years to plaintiff's period of exclusion was unreasonable or without foundation.

VI. CONCLUSION

For the stated reasons, the undersigned **RECOMMENDS** that the decision of the Secretary excluding plaintiff from participation in federally funded healthcare programs for a minimum of ten years be **AFFIRMED**. Plaintiff's Motion to Supplement the Record with the June 12, 1998 Letter [Doc. 16] is **GRANTED**, and plaintiff's Motion to Supplement the Record with the August 21, 1998 Letter [Doc. 17] is **DENIED**. The Clerk of the Court is **DIRECTED** to terminate referral of this action to the undersigned magistrate judge.

IT IS SO ORDERED AND RECOMMENDED this 18th day of April, 2002.

/s/ Gerrilyn G. Brill
GERRILYN G. BRILL
UNITED STATES
MAGISTRATE JUDGE